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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Hola, S.A.
v.
Entertainment Merchandising Technologies, L.L.C.

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Opposition No. 91162358
to application Serial No. 78275340
filed on July 17, 2003

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Michael J. Striker for Hola, S.A.

Richard L. Schwartz of Whitaker Chalk Swindle & Sawyer L.L.P. for Entertainment Merchandising Technologies, L.L.C.

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Before Grendel, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Entertainment Merchandising Technologies, L.L.C., applicant herein, seeks registration on the Principal Register of the mark **HELLO MONEY** (in standard character form) for goods identified in the application as "magnetically encoded prepaid phone cards," in Class 9.[1]

[1] Serial No. 78275340, filed on July 17, 2003. The application was based on intent-to-use under Trademark Act Section 1(b), 15 U.S.C. §1051(b). On March 18, 2004, applicant filed an Amendment to Allege Use in which it alleged November 15, 2002 as the date

Hola, S.A., opposer herein, has opposed registration of applicant's mark, alleging likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d), as its ground of opposition. Opposer, as its only evidence, has submitted a status and title copy of its Registration No. 2772805, which is of the mark depicted below

for goods and services identified in the registration as "newspapers for general circulation, fiction books, and general feature magazines," in Class 16, and "telecommunication services, namely, personal communication services," in Class 38.[2]

Initially, we reject applicant's argument that because opposer has not submitted any evidence of actual use of its mark in connection with any goods and services, opposer cannot prevail on its Section 2(d) claim. Section 2(d)

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of first use of the mark anywhere and the date of first use of the mark in commerce.

[2] Registration No. 2772805, issued October 14, 2003. This registration was not pleaded by opposer in the notice of opposition. Opposer submitted it via notice of reliance, and applicant has made no objection to our consideration of it. Indeed, in its brief, applicant has treated the registration as being of record. In view thereof, we deem the notice of opposition to be amended to include opposer's claim of ownership of this registration and its claim of likelihood of confusion based thereon. *See* Fed. R. Civ. P. 15(b); Trademark Rule 2.107(a), 37 C.F.R. §2.107(a).

allows opposer to rely solely on its registration as the basis for its opposition; opposer is not required to also prove actual use of its mark in order to prevail. Moreover, we must accord the registration all of the presumptions to which it is entitled under Trademark Act Section 7(b), 15 U.S.C. §1057(b), including the presumption of opposer's "exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate" of registration.

Also, we reject applicant's argument that opposer's HELLO! mark is "generic" as applied to the Class 38 services recited in the registration. Such an argument constitutes an impermissible collateral attack on the validity of opposer's registration, which will not be heard in the absence of a counterclaim for cancellation of the registration. The validity of opposer's registered mark and its registration must be presumed, under Trademark Act Section 7(b).

Because opposer's registration of record, and because opposer's likelihood of confusion claim is not frivolous, we find that opposer has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's

registration is of record, Section 2(d) priority is not an issue in this case as to the mark and goods covered by said registration. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a comparison, under the second *du Pont* factor, of the parties' goods and services as identified in the application and in the registration, respectively. It is settled that it is not necessary that the respective goods and services be identical or even competitive in order to support a finding of likelihood of confusion. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. It is sufficient that the goods be related in some manner, or that the circumstances

surrounding their use be such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

The identification of goods and services in opposer's registration includes "telecommunication services, namely personal communication services." We take judicial notice[3] that Webster's Third New International Dictionary of the English Language Unabridged (1993) defines "telecommunication" as "communication at a distance (as by cable, radio, telegraph, **telephone**, or television)." (Emphasis added.) Similarly, The American Heritage Dictionary of the English Language (4th ed. 2000) defines "telecommunication" as "the science and technology of communication at a distance by electronic transmission of

[3] The Board may take judicial notice of dictionary definitions. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

impulses, as by telegraph, cable, **telephone**, radio, or television." (Emphasis added.) Based on these definitions, we find that opposer's "telecommunication services" must be broadly construed to include telephone communication services. Moreover, telephone services obviously are a type of "personal communication services," within the qualifying language contained in the registration's recitation of services.

Looking solely to the terms of the respective identifications of goods and services in the registration and in the application,[4] we find that applicant's "magnetically encoded prepaid phone cards" and opposer's "telecommunication services," which, as discussed above, must be construed to include telephone services, are complementary goods and services which are sufficiently related that source confusion is likely to result if the goods and services are marketed under similar marks. The second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

We turn now to the first *du Pont* factor, i.e., whether applicant's mark, HELLO MONEY, and opposer's mark, HELLO! and design, are similar or dissimilar when compared in their

[4] *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002)(identifications of goods and services may suffice in themselves as evidence of the relatedness of the goods and services under the second *du Pont* factor).

entireties in terms of appearance, sound, connotation and commercial impression. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks and service marks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We find that applicant's mark is similar to opposer's mark in terms of appearance and sound to the extent that both marks include the word HELLO. The stylization of opposer's mark, including the exclamation point, is minimal and does not suffice to distinguish the two marks visually. In terms of connotation, the marks are similar to the extent that both include the word HELLO. This word is at most

suggestive when considered in the context of telephone goods and services (not descriptive or generic, as argued by applicant), but its presence in both marks renders the marks similar. The presence of the word MONEY in applicant's mark does not suffice to distinguish the marks; as applied to applicant's "prepaid phone cards," the word is highly suggestive. Moreover, the word HELLO comes first in applicant's mark and is therefore the more dominant feature of the mark. In terms of overall commercial impression, we find that the marks are similar because purchasers are likely to assume that the HELLO MONEY prepaid phone card is provided by, or sponsored or approved by, the provider of HELLO! telephone services; purchasers would assume that they could use HELLO MONEY to purchase HELLO! telephone services.

Considering all of the relevant *du Pont* factors, we find that a likelihood of confusion exists. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. *See Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *Ava Enterprises Inc. v. Audio Boss USA Inc.,* 77 USPQ2d 1783 (TTAB 2006); *Baseball America Inc. v. Powerplay Sports Ltd.,* 71 USPQ2d 1844 (TTAB 2004).

Decision: The opposition is sustained.